GREAT BASIN MINE WATCH

IBLA 2000-366 Decided September 26, 2003

Appeal from a decision by the Field Manager, Carson City, Nevada, Field Office, Bureau of Land Management, approving amendments to a plan of operations for the closure of the Candelaria Mine. N37-81-003P.

Appeal dismissed in part; decision affirmed.

1. Appeals: Jurisdiction--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction

The Board does not have proper authority to oversee a State program approved by the Environmental Protection Agency under the Resource Conservation and Recovery Act, and will not present a forum for arguments against the State's exercise of such delegated authority. Where an appeal requires the Board to intervene in the State's, or EPA's, implementation of authority under that statute, it will be dismissed.

APPEARANCES: Tom Myers, Reno, Nevada, for Great Basin Mine Watch; David K. Grayson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; Steven J. Christiansen, Esq., Daniel A. Jensen, Esq., David C. Reymann, Esq., Salt Lake City, Utah, for Kinross Candelaria Mining Co.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Great Basin Mine Watch (GBMW) appeals from a decision issued August 15, 2000, by the Field Manager, Carson City, Nevada, Field Office, Bureau of Land Management (BLM), approving amendments to a plan of operations for the closure of the Candelaria Mine operated by Kinross Candelaria Mining Co. (Kinross). BLM based the challenged decision on the analysis contained in an environmental

assessment (EA) prepared and finalized on July 21, 2000, for the project modifications. (EA-NV-030-00-003.) [1/]

The Candelaria Mine is located in an historic mining district in Mineral County, Nevada, where mining has taken place off and on since the 1860s. The current operations began in 1980. In 1981, BLM approved plan of operation NV-37-81-03 for Kinross' predecessor, NERCO Metals, Inc., pursuant to the requirements of 43 CFR Subpart 3809. Gold and silver mining using cyanide heap leaching methods continued intermittently through 1997 under a series of operation expansions approved by BLM.

BLM approved a 1991 comprehensive reclamation plan as a modification to the plan of operations by decision based on EA NV-030-92-032. Kinross submitted various closure plans and updates to the reclamation plan including a final reclamation plan dated July 1997. The Nevada Department of Environmental Protection (NDEP) issued reclamation permit No. 01619 to Kinross on February 16, 1999. In addition Kinross operated the mine pursuant to Nevada Water Pollution Control Permit NEV30010.

In June 1998, Kinross submitted a "Final Permanent Closure Plan" for the mine. The closure plan set forth methods for management of the final effluent from heap leach pads using subsurface "infiltration fields." On October 1, 1998, NDEP approved the closure plan subject to Kinross' submission of data as implementation occurred, and on the condition that leach pad "drain down" would have no potential impact on the waters of the State of Nevada. In February 1999, NDEP issued a temporary land application permit to Kinross permitting 40 million gallons of drain down from Leach Pad 1 to be applied to the initial infiltration field.

Before approving the mine closure plan, BLM determined that it was required to prepare documentation under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), requiring Federal agencies, in the course of their decision making, to take into account the environmental effects of major Federal actions which may significantly affect the human environment. BLM concluded that the project addressed in the final closure plan to use infiltration fields to stabilize and neutralize the heap leach pads and final effluent was a modification of the approved plan of operations, including its component reclamation plan, which required further NEPA review. (EA at 7.)

In October 1999, BLM issued for public comment draft EA-NV-030-00-003 for the Kinross Candelaria Mine Closure. GBMW submitted comments on May 2, 2000.

[1/] By order dated April 12, 2001, the Board concluded that GBMW had standing to appeal the decision but denied GBMW's petition for stay pending appeal.

BLM issued the final EA on July 21, 2000. The EA presented BLM's consideration of the proposed action, which was Kinross' closure plan, as well as alternatives 1-3, and the no action alternative.

The proposed action was to "apply heap leach rinsate from [leach pads 1 and 2] in two separate infiltration areas, and to construct two sub-surface infiltration fields to manage long-term residual drain down from the heaps." (EA at 10.) The process of closing the heap pads and managing the drain down is described in detail in the EA at pages 11-14, and in Kinross' closure plan.

BLM's Alternative 1 proposed, instead of two separate initial infiltration fields for the leach pads, a single field for rinsate drain down from both pads, to reduce by approximately 12 acres the total disturbed surface area. (EA at 15.) BLM proposed Alternative 2 to grapple with the issue of cyanide concentrations in the leach pads, in particular in leach pad 2, exceeding the level approved for release by NDEP. BLM proposed "batch treatment" of the rinsate drain down by chemical treatment of existing solution ponds and pumping to mix the ponds until target concentrations of cyanide were reached. Id. at 15-16.

Alternative 3 was proposed to maintain a zero discharge condition, retaining all constituents within the fluid containment system and evaporating the water instead of using the infiltration fields as a dispersal method. (EA at 16.) The EA specified other alternatives rejected. It also described the no action alternative which was to deny the closure plan as an amendment. The no action alternative would require future approval of an alternative closure plan. (EA at 16-18.)

On August 15, 2000, BLM issued its decision. BLM chose the proposed action "as modified by the inclusion of provisions from alternative 1, construction of a single initial infiltration field, and alternative 2 requiring batch treatment of initial effluent from heap leach pad LP-2 prior to release to the initial infiltration field." (Decision at 2.) The decision also set forth five enumerated conditions of the approved modification, id. at 2-3, management considerations involved, id. at 3-5, and mitigation and monitoring requirements, id. at 6-7.

The principal focus of GBMW's appeal is alleged violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq. (2000). GBMW argues that the drain down and long term seepage leachates from the Candelaria Mine should be considered solid hazardous waste under that statute. Presenting detailed argument regarding the proper interpretation of RCRA, an amendment to it, and regulations implementing and publications regarding RCRA, GBMW asserts that BLM erred in not construing the drain down, which is the subject of the closure plan, to be subject to RCRA. See EA at 8 (RCRA "[h]azardous waste factors do not apply

to the proposed action."). [2/] In addition, GBMW discusses "CERCLA sites," presumably referring to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §§ 9601-9675 (2000), implying that if RCRA were properly applied by BLM here, BLM would have been required to deal with the mine site as governed by CERCLA. Finally, GBMW argues that BLM allegedly erred in reaching conclusions regarding saturation and "storativity" levels at the mine site, and that these errors constitute a violation of NEPA. GBMW suggests that BLM's analysis of these factors would have been different if RCRA had properly been applied.

[1] We begin with the questions raised by GBMW regarding RCRA. GBMW acknowledges, as it must, that the Administrator of the Environmental Protection Agency (EPA) is delegated the authority and responsibility to implement RCRA and specifically to establish criteria for identifying and listing hazardous wastes. 42 U.S.C. § 6921 (2000). EPA is authorized to delegate implementation authority to states with approved hazardous waste programs. 42 U.S.C. § 6926 (2000). When a state regulatory authority, such as NDEP, issues a permit or takes action under such a program, it has "the same force and effect as action taken by the Administrator under the subchapter." 42 U.S.C. § 6926(d) (2000).

The parties agree that the State of Nevada has enforced RCRA and has interpreted the statute as it applies to waste from a heap leach gold mine. GBMW's complaint is that it does not agree with the State's interpretation. Seeking a ruling from the Board that BLM was wrong in following the State's interpretation, GBMW thus hopes for a construction of RCRA that will stand at odds with that of the State.

While we find no case directly on point in IBLA precedent, the extent to which IBLA will review decisions by other agencies has arisen in other contexts, and the Board has been careful to avoid taking the role of reviewing or opining on decisions by those agencies to implement authority delegated to them. In Las Vegas Valley Action Committee, 156 IBLA 110, 123 (2001), the Board recently limited the scope of an appeal to issues raised by a BLM decision that were "distinct from the issues finally decided by [the Federal Aviation Administration's] 1998 EA and FONSI that arise from the exercise of that agency's statutory authority." In Wyoming Independent Producers Association, 133 IBLA 65, 70-71 (1995), the Board dismissed an appeal in which we found that "it [was] the [Federal Energy Regulatory Commission] decision that adversely affects [an appellant] rather than that of BLM."

[2/] The EA states: "[R]insate and drain down are products of heap leach technology, which under 40 CFR 261.4(b)(7)(I) is defined as beneficiation and is exempt from regulation under RCRA Subtitle C. Therefore, the infiltration disposal units for these waters are not regulated under RCRA."

In Hoosier Environmental Council, 109 IBLA 160, 166 (1989), the Board concluded that IBLA is not the proper forum to consider a challenge to an EA issued by FERC.

Whether we couch the analysis in terms of dismissal, the appropriateness of the forum, or jurisdiction, we find the above described precedent persuasive and controlling here. Like the argument of the appellant in Las Vegas Valley Action Committee, GBMW's complaint regarding BLM's action is that it followed the lead of the State of Nevada with regard to how to view hazardous wastes under RCRA. Thus, to the extent that GBMW asks us to take on the task of construing RCRA anew, its challenge to BLM's decision is indistinct from the issues finally decided by NDEP that arose from the exercise of the State's, or the EPA's, statutory authority. As in Hoosier Environmental Council, this Board does not have proper authority to oversee the State program approved by EPA, and will not present a forum for GBMW's arguments against the State's exercise of its delegated authority.

We find no merit to GBMW's suggestion that, because the question involves Federal regulations, the Board has the authority to consider any question raised. (GBMW Statement of Reasons (SOR) at 6.) GBMW cites no authority authorizing the Board to revisit the State's construction of the EPA regulations regarding hazardous wastes. Any construction by this Board of those RCRA rules would at best constitute an advisory opinion. Where an appeal to the Board presents, in essence, a request for an advisory opinion, we properly decline to rule on that issue and the appeal will be dismissed. Bowers Oil and Gas, Inc., 152 IBLA 12, 18 (2000); Amax Coal Co., 131 IBLA 324, 327 (1994).

It appears that an advisory ruling on the topic of RCRA's coverage is the best the Board could afford GBMW. Whatever the Board might view to be the proper interpretation of the law, an interpretation in GBMW's favor would do nothing more than appear as a contradictory view to that of the State in any further litigation or adjudication between the State and GBMW. It would not vest BLM with the authority to implement the statute in the manner GBMW prefers; that authority remains clearly delegated to EPA and states with approved state programs. See Las Vegas Valley Action Committee, 156 IBLA at 126 (decision affirmed where appellant did not establish that BLM would have authority to impose more stringent requirements). [3/]
GBMW's RCRA argument is premised on a desire that the Board intervene in the State's implementation of its authority under statutes not within our jurisdiction. This portion of GBMW's appeal is dismissed.

[3/] To the extent GBMW asks that the Board halt the approved closure plan pending resolution of the debate between the agencies then created, this would effectively grant the stay that has already been denied, and subvert the routine judicial or administrative processes available for GBMW to challenge the State's decisions.

GBMW also presents a NEPA argument, much of it dependent on a favorable outcome of its request for a construction of RCRA. To the extent GBMW challenges BLM's consideration of effects under NEPA that are distinct from the State's construction of RCRA, we address those concerns. GBMW's NEPA argument (Petition for Stay at 19-22; SOR at 7-11) must be considered in light of an appellant's burden to show error in an EA.

In undertaking environmental documentation under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2000), an agency must take a "hard look" at the proposal being addressed, identifying relevant areas of environmental concern so that it might make an informed determination as to whether the environmental impact is insignificant or impacts will be reduced to insignificance by mitigation measures. See Colorado Environmental Commission, 142 IBLA 49, 52 (1997); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 174 (1987). The Board will affirm a decision based on an EA if the record establishes that BLM has engaged in a careful review of environmental consequences, all relevant environmental concerns have been identified, and the final determination is reasonable. Owen Severance, 118 IBLA 381, 392 (1991); Utah Wilderness Association, 80 IBLA at 78.

A party challenging such a decision must show that it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Southern Utah Wilderness Alliance, 122 IBLA 6, 12 (1991); G. Jon & Katherine M. Roush, 112 IBLA 293, 297 (1990); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985); Utah Wilderness Association, 80 IBLA at 78. An appellant "must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. * * * The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal." Rocky Mountain Trails Association, 156 IBLA 64, 71 (2001), citing Larry Thompson, 151 IBLA 208, 217 (1999); see also Glacier-Two Medicine Alliance, 88 IBLA at 141.

We find that GBMW's challenge under NEPA fails to meet its burden of proof. Rather, GBMW's analysis is a catalog of alleged but unsubstantiated errors in the EA. GBMW describes alleged failures, topics ignored, flaws and inadequacies. GBMW asserts that BLM's analysis "ignores heterogeneities, anisotropic conditions and preferential flow in the soil," (Petitition for Stay at 19), fails to consider preferential flow and fractures or "fingered flow," id. at 20, employs a model that uses uniform distribution of residual draindown which is "faulty analysis," id. at 21, uses a "questionable storativity definition," id. at 21, erroneously presumes saturation, id. at 21-22, and ignores adsorption, id. at 22. GBMW appears to believe that the result of these alleged inadequacies is that the flow will result in higher concentrations of

contaminants closer to the surface than BLM has projected. Id. at 22. In its SOR, GBMW focuses on general studies regarding the impacts of arsenic, mercury, and silver at high toxicity levels. (SOR at 7-13.) There, GBMW makes no additional allegation of an error in the EA, but rather states vaguely that the effects it describes may occur "[i]f anything goes wrong with the assumptions relied on by the company and the agency." Id. at 7.

It is clear from this description that GBMW believes BLM should have undertaken a different analysis of these factors. Less clear is any statement from GBMW of a significant environmental impact not considered by BLM that amounts to anything other than a disagreement by GBMW with the calculations in the EA. To the extent GBMW can be construed to have set forth a clear difference of opinion, its view is not substantiated by objective proof.

It is worth noting as well that the particular context in which this appeal arises affects our determination of whether GBMW has met its burden. BLM approved a plan of operations for a heap leach mine decades ago, and subsequently approved various amendments to it. The mine has been operating for 17 years and must be closed. It was incumbent upon GBMW to explain how, in BLM's consideration of the closure plan and subsequent adoption of alternatives to mitigate adverse impacts of closure, a different and better outcome could have pertained had BLM followed GBMW's reasoning, notwithstanding the delay in closing a site with pre-existing environmental consequences that would be occasioned by the Board's accepting GBMW's argument and reversing the BLM decision. GBMW's disagreements with BLM regarding the possible resulting concentrations of particular leachate components are abstract and devoid of the context in which the Board must rule. It is not possible to tell what GBMW believes should happen in BLM's consideration of the closure plan that would allegedly be better than the closure BLM has authorized, or whether, in the circumstances, GBMW even contends that the no action alternative or alternative 3 would have been better. Our concern is whether delay in closure will worsen certain impacts and GBMW's failure to identify the relative consequence of its requested delay makes its general disagreements even more difficult to analyze. [4/]

In these circumstances, we find that GBMW has failed to make a case under NEPA. To the extent not specifically addressed herein, GBMW's other arguments have been considered and rejected.

[4/] Both BLM and Kinross attempt to sort through GBMW's various contentions, identifying locations in the EA where allegedly ignored information may be found, and responding to GBMW's comments. (BLM Response to Request for Stay at 4-5; Kinross' Memorandum in Opposition to Petition for Stay at 19-27.) These responses demonstrate that BLM undertook a full consideration of the issues addressed by GBMW. GBMW does not refute them.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed in part and the decision appealed from is affirmed.

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Lisa Hemmer
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge